IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 400 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

ABDUL GAFFAR KHAN S/O. ABDUL REHMAN KHAN PATHAN

Versus

STATE OF GUJARAT

Appearance:
MR YS LAKHANI for Appellant
MR KC SHAH, APP, for Respondent No. 1

CORAM : MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.L.DAVE

Date of decision: 13/10/98

ORAL JUDGEMENT (Per Dave, J.)

1. Additional Sessions Judge, Jamnagar, while deciding Sessions Case No.12 of 1992 before him, recorded conviction of present appellant on 4th February, 1993 and sentenced the appellant to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.1 lakh or to undergo further simple imprisonment for a period of one year in

the event of default in payment of fine. The accused-appellant was convicted for the offence punishable under Section 8 read with Section 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act ("NDPS Act" hereafter) and he has, therefore, preferred this appeal challenging the findings recorded in the said judgment and order of the learned Additional Sessions Judge, Jamnagar, in Sessions Case No.12 of 1992.

2. Dy.S.P., Jamnagar, R.J. Sawani received a secret information on 15th May, 1992 to the effect that the appellant-accused-Abdul Gaffar Khan, staying in Street No.4 of Momainagar of Gandhinagar area of Jamnagar city illegally keeps in his house stock of contraband Charas. He, therefore, immediately made an entry in the Station Diary at about 12.10 A.M. in the City "B" Division Police Station of Jamnagar. Thereafter, he called two Panch witnesses and prepared a preliminary Panchnama after apprising them about the information received by him and the purpose of calling them, namely, commission of raid. Thereafter, along with Dy.S.P. Jebaliya, Task Force, PSI-Jhala and other police personnel and Panch witnesses went to the house of the appellant and called him. On being searched, quantity of Charas was found from the pocket of his trousers. The said quantity was weighed with the help of Navinchandra Vithaldas Soni and was found to be 148 grams. Samples weighing 25 grams each were drawn therefrom and the samples as well as the remaining principal quantity were sealed in presence of Panch witnesses. While searching the house, larger quantity of Charas weighing 1790 grams was found from the house of the accused-appellant, wherefrom also two samples each weighing 25 grams were drawn in presence of Panch witnesses and they were duly sealed along with remaining principal quantity of Charas found from the house of the accused-appellant. The Panchnama was then concluded. First Information Report was lodged against the accused-appellant and was sent to the P.S.O., Jamnagar City "B" Division Police Station along with accused and the muddamal seized. The offence was registered by the P.S.O., Head Constable-Ranjitsinh Naranbhai Rana. Thereafter, the samples were sent to the Forensic Science Laboratory (FSL), Junagadh, through LCB. The FSL, Junagadh, analysed the samples and then, ultimately, sent a report to the effect that the samples were contraband Charas. On the basis of this investigation, charge sheet was filed in Court. The accused-appellant pleaded not guilty to the charge against him and expressed his desire to face the trial. The prosecution, in turn, examined in all 13 witnesses and also adduced documentary evidence in support of its

case. The learned Additional Sessions Judge, upon considering and weighing the evidence on record, came to a conclusion that the prosecution had successfully proved the charge against the accused-appellant and held him to be guilty of the offences that he was charged with. The learned Additional Sessions Judge, while recording the judgment and order impugned in this appeal, imposed the sentence as stated above after convicting the accused-appellant and the said judgment and order is, therefore, challenged in this appeal.

3. Mr. Y.S. Lakhani, learned advocate appearing for the appellant, has put thrust during the course of his arguments on factual aspects of the investigation and has not pressed for any technical defence as to non-compliance of any mandatory provisions of law regarding search, seizure and arrest.

4. Mr. Lakhani submitted that the prosecution case hangs only on deposition of official witnesses since all Panch witnesses have not supported the prosecution case. Even the person who weighed the contraband has not supported the prosecution case and they have all been declared hostile by the prosecution. Mr. Lakhani, therefore, urged that the evidence of the prosecution may be closely scrutinized.

4.1 The second argument advanced by Mr. Lakhani is that, witness-Jayantilal Chhaganlal, who took the muddamal samples from P.S.O. to the LCB, has not been examined to establish a complete chain of links to indicate that the muddamal in question had remained intact till it reached the FSL. This being a vital flaw in the prosecution case, the learned Additional Sessions Judge ought to have given benefit of doubt to the accused-appellant.

4.2 Mr. Lakhani submitted that there is a discrepancy about the timing. Contrary versions are coming on record as to at what point of time the raiding party returned to the Police Station, whether at 5.10 A.M. or 7.30 A.M. This will have a direct bearing on the F.I.R., which would render the prosecution cripple as the very basis of the prosecution case would slip into a cloud of doubt.

4.3 Mr. Lakhani then drew our attention to the evidence as to the personal search of the accused. He submitted that the evidence is contradictory. It is a matter of doubt whether the search was carried out in the house or in the Fali - an open courtyard in front of the

house. He submitted that the defence version is that the house does not have any open courtyard in its front. The benefit of doubt, therefore, should go to the accused.

4.4 As regards the procedure followed for sealing and sampling, learned advocate Mr. Lakhani for the appellant submitted that it does not inspire any confidence, if the Panchnama, the deposition of the witnesses and the FSL report are considered simultaneously. The Panchnama is silent about heat sealing of the samples. The witnesses speak of heat sealing of the samples only because the FSL report says so and, therefore, the procedure followed for sealing and sampling becomes doubtful.

4.5 As regards the seizure of larger quantity of contraband Charas, Mr. Lakhani has drawn our attention to certain depositions and has submitted that there is contradiction as to the exact place wherefrom the said quantity of Charas is alleged to have been found. It becomes doubtful whether that quantity was found from the loft of the kitchen or was found lying on the floor of the kitchen or was found lying on the floor of the room other than kitchen. In the result, this seizure also becomes doubtful and the possibility of planting has to be visualised by the Court.

4.6 Drawing attention to the FSL report, Mr. Lakhani submitted that the FSL report indicates that each of the sample contained small particles of Charas different in number whereas there is no mention whatsoever either in the Panchnama or in the complaint or even in the depositions regarding the samples having small pieces of Charas, as is found by the FSL. The entire evidence other than the FSL report speaks of Charas sample taken out weighing 25 grams. The prosecution has not explained as to how the FSL report indicates each sample of 25 grams having small pieces of contraband. He submitted that this aspect will have to be considered in light of the fact that witness-Jayantilal Chhaganlal, who took the samples from PSO of the Police Station to the LCB office, has not been examined to rule out the possibility of tampering.

4.7 Lastly, Mr. Lakhani submitted that the prosecution has not examined Dy.S.P. Jebaliya as a witness who could have thrown some light on the sequence of happenings at the time of raid.

4.8 Emphasising on the cumulative effect of all these aspects, Mr. Lakhani urged that the defence has been able to show that the prosecution story is not beyond

reasonable doubt and, therefore, the benefit must flow to the accused-appellant. The learned Additional Sessions Judge, according to Mr. Lakhani, has overlooked these aspects and has, therefore, fallen in error of convicting the accused. Mr. Lakhani, therefore, urged that the appeal may be allowed, conviction may be set aside and the accused-appellant may be acquitted.

5. Mr. K.C. Shah, learned Additional Public Prosecutor, submitted that the impugned judgment and order is not erroneous in any manner, either factually or legally. He submitted that non-examination of witness-Jayantilal Chhaganlal need not affect the merits of the prosecution case. According to Mr. Shah, Jayantilal Chhaganlal had very little role to play. He has worked only as a messenger. He had collected sample from the PSO "B" Division Police Station and delivered the same to the LCB. The sealing part is proved through witnesses. There is no dispute about the sealing of the samples so far as the wax seals are concerned. The wax seals are found to be intact by the FSL and, therefore, non-examination of Jayantibhai Chhaganbhai does not create any doubt regarding the possibility of tampering of the samples. Mr. Shah has then broadly adopted the factors adopted by the learned trial Judge for recording the conviction and has urged that the appeal does not merit any allowance and may, therefore, be dismissed.

6. We have closely scrutinized the evidence. We have been taken through relevant portions of evidence by both the sides.

7. After having gone through the entire record and proceedings, we find that the investigating agency has strictly and scrupulously followed the mandatory requirements of the NDPS Act, which shuts the doors for the appellant to argue on such technical aspects.

8. It is a settled proposition of law that it is always not necessary for the prosecution to examine all the witnesses. Likewise, it cannot be said that because Panch witnesses had not supported the prosecution case, the prosecution story as emerging from the official witnesses cannot be accepted. If the official witnesses are found to be otherwise reliable and trustworthy, their evidence can be accepted as evidence of any other witness. The Court has to be slightly more careful while perusing such evidence when it is not supported by independent witnesses and, therefore, because in the instant case the Panch witnesses and the person who weighed the muddamal have not supported, it cannot be

said that the case of the prosecution cannot be accepted. The witnesses, if otherwise found to be reliable, trustworthy and truthful, they can be accepted as supports to the proseuction case and even a conviction can be based thereon.

9. We have gone through the evidence of witnesses examined by the prosecution. We have closely scrutinized the evidence by police witnesses in particular and we find that the evidence, taken as a whole, has a ring of truth in it. It cannot be overlooked that when evidence is recorded after a lapse of time, there is bound to be some discrepancy here and there. This is the outcome of human limitations of memory, observation power and description power. On the contrary, if a witness deposes exactly as per his original version, it should call for a still closer scrutiny as chances of that witness being tutored or having prepared for the deposition are greater. The depositions, in the instant case, are found to have flown in a natural manner and are, therefore, found to contain certain discrepancy which, in our opinion, are of no virtue to the defence and of no adverse consequence to the prosecution and, therefore, simply because the Panch witnesses have not supported or have turned hostile to the prosecution case , it would not affect the prosecution case.

10. As regards the argument that the procedure followed for sealing and sampling is doubtful, it may be noted that the Panchnama speaks of heat sealing of the remaining quantity of the contraband seized in a plastic bag before putting the same into a paper packet and sealing the same with wax. But it is silent about heat sealing of the samples of 25 grams each. Against this, the FSL report indicates that the samples were received by the FSL with the wax seals intact and the plastic bags were heat sealed. The deposition of the police witnesses indicates that the samples as also the remaining portion of the contraband were all heat sealed. It is attempted to indicate that the police witnesses have made their version by adding this part in their deposition. If the overall scenario is considered from the evidence on record, it appears that non-mentioning of heat sealing of the plastic bags containing the samples is only an omission which may be result of inadvertence or loose drafting of the Panchnama. If the remaining large quantity of the contraband seized was heat sealed, obviously, the samples can be inferred to have been heat sealed and the same is found to be so done, as can be seen from the FSL report and, therefore, mere non-mentioning of heat sealing of samples does not affect

the prosecution case in its substratum particularly when the external cover which was sealed with wax was found to be intact by the FSL, as can be seen from the FSL report. The factum of wax sealing and the procedure therefor at the time of the seizure is nowhere under a suspicion or doubt. The muddamal so seized was immediately forwarded to the PSO along with complaint and accused and, on the next day, it was sent by the PSO to the LCB through Jayantilal Chhaganlal and by the LCB to the FSL through Mangalsing Mohabatsing, who has been examined and the FSL has found the seal intact. This totally rules out the possibility of any tampering with the muddamal and is a square answer to the argument advanced by Mr. Lakhani to the effect that Jayantilal Chhaganlal is not examined, who is the person who has taken the muddamal from PSO, "B" Division to the LCB and to the argument that the sampling procedure is doubtful.

11. Another aspect that requires consideration from what is argued on behalf of the appellant is the nature of samples that were collected. It is true that the samples which were received by the FSL were each weighing 25 grams, but they all had a number of small particles of the contraband to constitute that quantum of 25 grams. Against this, the Panchnama and the evidence of the witnesses are totally silent about the number of pieces or particles that constituted the samples of 25 grams each. It is, therefore, argued that when there is absence of mention of plurality of number of pieces, it should be presumed to be one piece and, therefore, it is doubtful whether the samples that reached the FSL are the same samples which were collected at the time of seizure. In this regard, at the outset, it may be noted that no such presumption can be drawn that because there is absence of mention about plurality of pieces, it must be a single piece. Of course, it was for the prosecution to adduce specific evidence in this regard. But failure on part of the prosecution in adducing such evidence, in the facts of the present case, does not adversely affect the very texture of the prosecution case for the reason that the sampling and sealing procedure is found to be trustworthy and the samples collected and sealed have reached the FSL in untampered and intact condition and, therefore, this mere omission of mentioning the plurality of pieces cannot be viewed adversely. Besides, this, it has to be noted that the FSL report states that the pieces that were found in the samples were resinous. When a larger block is traced and sample in small quantity of a specific weight is to be taken out of it, naturally, small pieces will have to be taken out of the main block so that exact weight is derived and the

possibility of small pieces remaining loose from the main block is negatived. When the material seized is resinous, naturally, it would be difficult to derive out of the main block a sample exactly weighing 25 grams and, therefore, the presence of multiple small pieces is only natural to be found. The result is that the argument advanced by Mr. Lakhani and his attempt to raise doubt about the sampling, sealing and resultant outcome of the FSL report cannot be accepted.

12. If deposition of witness-Rameshbhai Sawani, Ex.130, is seen, he states that he reached the Police Station at about 7.30 A.M. after completing the raid and procedure of search and seizure. Against this, if deposition of Ranjitsinh Rana, Ex.31, is seen, he says that the complaint was registered at 5.10 A.M. He says that he has no idea where Dy.S.P. Sawani was. He denies the suggestion that the complaint was given to him at 7.30 A.M. The F.I.R. produced on record at Ex.15, if perused, indicates that the offence was registered at 5.10 A.M. on 15th May, 1992. It is, therefore, clear that, factually, there is no contradiction. The F.I.R. along with the accused and the muddamal was sent to the Police Station and the offence was registered at 5.10 A.M. But Dy.S.P. Sawani reached the Police Station at 7.30 A.M. These two are different events and they cannot be interrelated. Dy.S.P. Sawani only says that, after completing the procedure, he reached the Police Station at 7.30 A.M. This he states during his cross-examination. It is not his say that he directly went to the Police Station from the place of the incident nor it is his say that he went to the Police Station immediately after completing the procedure. Further, as discussed earlier, there could be a possibility of a bona fide error in registering the timings in the mind and in such events, mentioning of a particular time by a witness on basis of his memory as compared to the contemporaneous record will definitely carry lesser weightage. In any case, this contradiction has no bearing on the incident and the charge against the accused. It depends on the memory of a witness and whether he has really mentally registered the timings or not, as can be seen from the deposition, this witness has stated the approximate time of his reaching the Police Station. This contradiction, therefore, does not affect the prosecution case and the objection raised by the appellant in this regard cannot be accepted.

13. As regards the search of person of the accused, a dispute is raised as to whether the search was carried out in the house or in the Fali - courtyard. The defence

of the accused is that his house has no Fali. Unfortunately, there is no specific direct evidence led by the prosecution to indicate the presence of Fali. But it transpires from the deposition of witnesses that the house had a Fali. When they reached the place, Dy.S.P. Sawani shouted the name of Abdul Gaffar Khan, whereupon the accused opened the door. He was told that the police had information that he is dealing in Charas and, therefore, he has to be searched. Thereafter, they entered the house after complying with the requirement of Section 50 of the NDPS Act and searched the person of Abdul Gaffar Khan, the accused-appellant, whereupon they found contraband Charas from the left pocket of his trousers. Panchnama, Ex.14, indicates that, after the accused opened the door, Dy.S.P. Sawani introduced himself, complied with the requirement of Section 50 of the NDPS Act and, thereafter, search of person of the accused was carried out and contraband was found from the left pocket of the trousers of the accused. Witness-Sukhdevsinh Jhala, Ex.30, states that they went to the house of the accused, Sawani got the door opened by shouting the name of the appellant, introduced themselves, complied with the requirement of Section 50 of the NDPS Act and, thereafter, the person of the accused was searched and contraband was found. This witness, in cross-examination, states that when the search of the person of the accused was carried out in the Fali and Charas was found, all the persons were at that place only. Then he says that he has not stated in his police statement that Charas was found out by Sawani during search of the person of the accused in the Fali. Thus, it appears that the first answer was mainly aimed at presence of the persons at the time of making of search and the attention was mainly focussed on that aspect and not the place where the search was carried out. In fact, this was a presumptive question that was put to the witness, to which the witness replied inadvertently mainly having the focus of his attention on the aspect of presence of the members of the raiding party. Thus, considering all these pieces of evidence collectively, it appears that Dy.S.P. Sawani, Ex.13, only indicates that upon the accused-appellant opening the door, they introduced themselves, complied with the requirements of Section 50 of the NDPS Act and then carried out the search of the person of the accused. He does not say exactly at what place, whether at the door step or inside the house or outside in the Fali the search was carried out and same is the deposition so far as Panchnama Ex.14 is concerned. It also says that, after the formalities of introduction and compliance of requirements of Section 50 were carried out, the person

of the accused was searched. It is only in the deposition of witness Sukhdevsinh Jhala that an illusory doubt is attempted to be created by flinging a presumptive question focussing on presence of witness rather than on the place of search. As such, that doubt is ruled out by the very next question put in the cross-examination. This witness has not stated anything in his examination-in-chief as regards the place of search of the person of the accused. In fact, this negatives the defence version of the house not having a Fali. The argument in this regard, therefore, cannot be accepted.

14. As regards the argument that the place of finding of larger quantity of contraband lying in the house of the accused, it may be noted that, according to witness-Sawani, he found the contraband on the loft of the kitchen. Against this, the Panchnama, if perused, indicates that the said contraband was found lying on the floor of the kitchen, near a cupboard on the wall. Sukhdevsinh Jhala, in his deposition Ex.30, states that the he had seen the entire house and when he entered the kitchen, he found the packet containing contraband. He admits that there is a loft in the kitchen. He pleads ignorance about wherefrom Sawani got the contraband. Then he says that he does not remember whether Sawani told him that he had traced the contraband from the loft. The contradiction that comes to the light is, therefore, regarding whether the contraband Charas of 1790 grams was found lying on the loft of the kitchen or on the floor of the kitchen. Sawani Says that he found it from the loft whereas the Panchnama speaks of that contraband lying on the floor of the kitchen. In this regard, close scrutiny of deposition of Sawani and the other witness-Sukhdevsinh Jhala is required. Sawani in his deposition says that after they reached the house, he shouted the name of Abdul Gaffar Khan, upon which the accused opened the door. After the formalities and compliance of Section 50 were over, they searched the person of accused and found contraband from the left pocket of the trouser worn by the accused. He, therefore, called for a person to weigh the same. Upon weighing, it was found to be 148 grams. Out of that quantity, two samples of 25 grams each were drawn. The procedure in this regard was going on, when simultaneously the personnel from the Task Force and Sub-Inspector Sukhdevsinh Jhala were helping him. He entered the kitchen and found a yellow coloured bag from the loft. That bag contained the contraband weighing 1790 grams. Thereafter, samples were drawn weighing 25 grams each and procedure for sealing was done. This indicates that while the procedure for sampling and

sealing of the contraband seized from the person of the accused was going on, this witness entered the kitchen and found the contraband from the loft of the kitchen, which he showed to the accused also. Probably, thereafter, i.e. after the formalities of sealing and sampling of the contraband seized from the person of the accused was over, the remaining procedure was done and, obviously, at that point of time, the bag containing the contraband may not have been found on the loft. In this regard, deposition of Sukhdevsinh Jhala, Ex.30, is also important. He says that he had not carried out the search of the house of the accused himself on his own but he says that Sawani did enter the kitchen and at that time, he was in the other room and entered the kitchen after some time and, at that point of time, he saw the bag containing contraband Charas. This corroborates the version emerging from the deposition of Sawani because Sawani in his cross-examination asserts with full force that it is true that he found the contraband from the loft and it is equally true that it is mentioned in the Panchnama that the contraband was found near the wall cupboard in the kitchen lying on the floor. Thus, this illusive contradiction does not create a doubt strong enough to dynamite the prosecution case. In fact, the cumulative effect of the deposition of these two witnesses and the Panchnama, as is coming on the record, is the lucid picturesque and natural reproduction of what must have transpired at the time of the raid.

15. Non examination of Dy.S.P. Jebaliya, as stated at the very outset, cannot affect the prosecution case when the other witnesses are found to be reliable and non-examination of a witness cannot adversely affect the prosecution case.

16. It may be noted that the accused-appellant has disputed the existence of Fali. But deposition of P.S.I. Jhala negatives this doubt tried to be created by the defence. During cross-examination, this witness says that, as they entered the house, first was the Fali, i.e. the courtyard. There is no doubt that the raid was conducted in the house of the accused because there is material evidence to indicate that the house was owned by the accused and was in his possession. Apart from that aspect, the accused himself is found to be possessing contraband and, therefore, no doubt is left to culminate into acquittal of the accused by giving him benefit of doubt, if overall assessment of the evidence on record is made.

17. It may be noted that here is a case where raid is

conducted by no less Senior Officers than of the rank of Dy.S.P., namely Dy.S.P. Sawani and Dy.S.P. Jebaliya. All the mandatory requirements of the NDPS Act have been fulfilled. Additionally, at the time of seizure, the accused was also asked to put his own seal, if he so wanted to do. This greatly reflects the bonafides of the investigation.

18. The sum total of the above discussion is that the doubts that are tried to be raised by the appellant must end up in his failure to do so and the appeal must fail on facts as well as on law.

19. Mr. Lakhani has pressed reliance on the decision of the Supreme Court in the case of Bir Singh v. State of U.P., A.I.R. 1978 SC 59 to indicate that the prosecution must examine independent witnesses, if they are available. Examination of only interested witnesses would lead to adverse inference. In the instant case, the prosecution did examine independent witnesses, who did not support the prosecution case and, therefore, this decision is not applicable to the facts of the present case.

20. Mr. Lakhani then placed in service the decision of the Supreme Court in the case of State of Rajasthan v. Daulatram, A.I.R. 1980 SC 1314, to emphasis that the prosecution must examine all persons who have handled the samples of the contraband seized. In that case, samples of opium had changed hands number of times before reaching the Public Analyst and various persons in custody of the sample were not examined and it was observed that conviction was not warranted. Upon going through the said decision, it is found that, in that case, when the sample reached the office of the Superintendent of Police, the said office refused to accept the same since the labels were not in order. This fact situation is non-existent in the present case. On the contrary, in the instant case, the sampling and sealing aspect at the time of the seizure is properly established and the samples have reached the FSL intact, in the sealed condition and there is no controversy about it and, therefore, mere non-examination of witness-Jayantilal Chhaganlal who took the sample from the PSO, "B" Division Police Station to the LCB will not raise any doubt about the possibility of any mischief being played with the muddamal.

21. Considering that the prosecution has established the seizure of the contraband, the conviction recorded by the trial Court cannot be said to be erroneous in any

manner. We fully agree with the reasons recorded and conclusions arrived at by the trial Court in the impugned judgment and order and see no reason for any interference in the same. The appeal, therefore, must fail and is, therefore, dismissed.

[J.N. BHATT, J.]

[A.L. DAVE, J.]

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